UNRWA DISPUTE TRIBUNAL

Case No.: UNRWA/DT/IFO/2012/09
UNRWA/DT/IFO/2012/16
UNRWA/DT/IFO/2014/007
Judgment No.: UNRWA/DT/2014/036
Date: 22 October 2014
Original: English

Before: Judge Jean-François Cousin
Registry: Amman
Registrar: Laurie McNabb

SALEM

v.

COMMISSIONER GENERAL OF THE
UNITED NATIONS RELIEF AND WORKS
AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Amer Abu-Khalaf (LOSΔ)

Counsel for Respondent:
Lance Bartholomeusz (DLA)
1. These are three applications by Amal Salem (the “Applicant”) against three different but related decisions of the United Nations Relief and Works Agency for Palestine refugees in the Near East, also known as UNRWA (the “Respondent”), namely:

   a) the decision not to confirm her appointment after a probationary period as Chief Area Office (“CAO”), Grade 20 at Zarqa Area, and to separate her from service upon the expiry of her appointment on 16 September 2011. This application has been registered under Case No. UNRWA/DT/JFO/2012/09;

   b) the decision of the Acting Chief, Investigations Division of the Department of Internal Oversight Services (“DIOS”) not to investigate her complaint of discrimination and abuse of power against the Director of UNRWA Operations, Jordan (“DUO/J”). This application has been registered under Case No. UNRWA/DT/JFO/2012/16; and

   c) the decision of the Chief, Investigations Division (“C/ID”), DIOS that the evidence obtained did not substantiate the Applicant’s complaint of discrimination and abuse of power against the DUO/J. This application has been registered under Case No. UNRWA/DT/JFO/2014/007.

2. As the applications mentioned above have been filed by the same Applicant and relate to the same issue, i.e. the Applicant’s separation from service, the Tribunal has decided to consolidate the three cases and dispose of them in one Judgment.

Facts

3. Effective 17 August 2008, the Applicant was employed by the Agency as Area Officer, Zarqa Area, Jordan, at Grade 16 on a fixed-term appointment.

4. Effective 1 April 2010, the Applicant was promoted to the post of CAO, Zarqa Area, at Grade 20 with a probationary period of one-year, due to expire on 31 March 2011.
5. On 1 February 2011, a new DUO/J, Ms. Sandra Mitchell was appointed.

6. On 31 March 2011, the Applicant was informed that her probationary period would be extended for three months until 30 June 2011.

7. On 28 April 2011, the DUO/J and the Field, Human Resources Officer, Jordan ("FHRO/J") met with the Applicant to discuss the details of an Opportunity to Improve ("OTI") working plan.

8. On 3 May 2011, the DUO/J sent to the Applicant an OTI working plan for the period from 31 March 2011 to 30 June 2011.

9. By letter dated 25 May 2011 to the DUO/J, the Applicant disputed the period of the OTI working plan alleging that it did not cover 90 days.

10. By email dated 13 June 2011, the Human Resources Career Management Officer, Jordan ("HRCMO/J") informed the Applicant that the OTI period would be extended until 5 August 2011.

11. On 23 June 2011, a mid-term review meeting took place between the DUO/J, the FHRO/J, the HRCMO/J and the Applicant. Upon the DUO/J’s request, the Applicant submitted a mid-term OTI report to the DUO/J on 27 June 2011. On 30 June 2011, another mid-term review meeting took place.

12. By a letter dated 31 July 2011, the Applicant was informed that her probationary period would be extended until 5 September 2011. The same day, another letter was sent to the Applicant informing her of the extension of her probationary period until 16 September 2011.

13. On 5 September 2011, the DUO/J informed the Applicant that, following the probationary period, her appointment as CAO would not be confirmed. However, the DUO/J offered the Applicant a post in the JFO Project Office at her previous Grade 16 with additional 10 steps. By letter dated 8 September 2011, the Applicant refused the offer.
14. By letter dated 14 September 2011, the DUO/J advised the Applicant that her contract would expire on 16 September 2011. The Applicant was separated from the Agency upon the expiry of her appointment.

15. By email dated 16 September 2011, the Applicant submitted to the Director, DIOS ("D/DIOS") a complaint of discrimination and abuse of power against the DUO/J.

16. On 26 September 2011, the Acting Chief, Investigations Division, DIOS, informed the Applicant that her complaint of discrimination and abuse of power against the DUO/J would not be subject to an investigation.

17. On 30 October 2011, the Applicant requested review of the decision not to confirm her in the CAO post.

18. By letter dated 30 October 2011, the Applicant requested the Commissioner-General to suspend the implementation of the decision to separate her from the Agency pending the outcome of the decision review.

19. By letter dated 22 November 2011, the Director of Human Resources informed the Applicant that the decision to separate her from the Agency would not be suspended.

20. On 23 November 2011, the Applicant requested review of the decision of the Acting Chief, Investigations Division, DIOS, not to investigate her complaint of discrimination and abuse of power against the DUO/J.

21. On 21 February 2012, the Applicant filed an application with the Tribunal challenging the decision not to confirm her appointment as CAO and to separate her from service upon the expiry of her appointment (Case No. UNRWA/DT/JFO/2012/09).

22. By letter dated 4 March 2012, the Deputy Commissioner-General replied to the Applicant’s request for decision review. The decision not to confirm the Applicant in the CAO post was upheld.
23. On 13 March 2012, the Applicant filed an application with the Tribunal challenging the decision not to investigate her complaint of discrimination and abuse of power against the DUO/J (Case No. UNRWA/DT/JFO/2012/16).

24. Upon review of the Applicant’s case prior to its closure in April 2012, the DIOS management decided that an investigation was warranted and initiated an investigation into the Applicant’s complaint.

25. On 21 May 2012, the Applicant filed a motion requesting the Tribunal to deny the Respondent the opportunity to participate in the proceedings in cases UNRWA/DT/JFO/2012/09 and UNRWA/DT/JFO/2012/16, including filing a reply. The motion was transmitted to the Respondent.

26. On 15 June 2012, the Respondent replied to the Applicant’s motion requesting the Tribunal to grant him leave to take part in the proceedings and to extend the time limits for the submission of his replies in cases UNRWA/DT/JFO/2012/09 and UNRWA/DT/JFO/2012/16.

27. By Order No. 013 (UNRWA/DT/2012) dated 19 June 2012, the Tribunal granted leave to the Respondent to participate in the proceedings in cases UNRWA/DT/JFO/2012/09 and UNRWA/DT/JFO/2012/16 and to file late his replies to the applications.

28. On 24 June 2013, the Respondent filed a reply to the application in Case No. UNRWA/DT/JFO/2012/09.

29. On 28 June 2013, the Respondent filed a reply to the application in Case No. UNRWA/DT/JFO/2012/16.

30. On 9 July 2013, the Applicant requested leave to file observations on the Respondent’s reply in Case No. UNRWA/DT/JFO/2012/09 and in Case No. UNRWA/DT/JFO/2012/16.

31. By Order No. 071 (UNRWA/DT/2013) dated 16 July 2013, the Applicant’s request for leave to file observations in Case No. UNRWA/DT/JFO/2012/16 was granted.
32. By Order No. 072 (UNRWA/DT/2013) dated 16 July 2013, the Applicant’s request for leave to file observations in Case No. UNRWA/DT/JFO/2012/09 was granted.

33. On 16 July 2013, the DIOS issued a report on the Applicant’s allegations of discrimination and abuse of power. In its report, the DIOS concluded inter alia that the evidence did not substantiate the Applicant’s allegations of discrimination and abuse of power against the DUO/J, Ms. Mitchell.

34. On 23 July 2013, the Respondent submitted his response to the Applicant’s request for leave to file observations on the Respondent’s reply.

35. By Orders No. 086 and 087 (UNRWA/DT/2013) dated 10 September 2013, the Tribunal rescinded Orders No. 071 and 072 (UNRWA/DT/2013) and requested the Applicant to provide more details concerning her requests. The Respondent was also granted an opportunity to file a response after receiving the Applicant’s submissions.

36. By email dated 23 September 2013, the C/ID, DIOS informed the Applicant that the investigation had been completed and that the evidence obtained did not substantiate her complaint of “misconduct” against the DUO/J.

37. Upon receiving the submissions of both parties pursuant to Order No. 086 (UNRWA/DT/2013), by Order No. 107 (UNRWA/DT/2013) dated 4 November 2013, the Applicant’s request for leave to file observations on the Respondent’s reply was partially granted.

38. Upon receiving the submissions of both parties pursuant to Order No. 087 (UNRWA/DT/2013), by Order No. 108 (UNRWA/DT/2013) dated 5 November 2013, the Applicant’s request for leave to file observations on the Respondent’s reply was partially granted.

39. On 20 November 2013, the Applicant requested review of the C/ID, DIOS’ decision that the evidence obtained during the investigation did not
substantiate her complaint of discrimination and abuse of power against the DUO/J.

40. On 28 November 2013, the Applicant filed with the Tribunal a “motion for production of documents and evidence” in Case No. UNRWA/DT/JFO/2012/16. In her motion, the Applicant requested that the Tribunal order the Respondent to produce: (1) “[t]he report of investigation into the Applicant[s] complaints against former DUO/J”; (2) “[s]tatistical information reflecting how often DIOS finds [(a)] against the Administration when a complaint is filed by a staff member against the Administration; and [(b)] against staff members when a complaint is raised by the Administration against a staff member”.

41. On 12 December 2013, the Respondent filed his response to the Applicant’s motion for production of documents and evidence.

42. By Order No. 013 (UNRWA/DT/2014) dated 28 January 2014, the Tribunal denied the Applicant’s request for statistical information and ordered the Respondent to produce ex parte any document that purports to be a report of any action taken by the DIOS with respect to the Applicant’s complaint. The Tribunal noted that “[i]f no such document exists, then the Respondent is to certify that information in an affidavit”.

43. On 20 February 2014, in response to Order No. 013 (UNRWA/DT/2014), the Respondent produced a 14-page Closure Report from the DIOS dated 16 July 2013 regarding the Applicant’s allegation of discrimination and abuse of power. The Respondent also produced an affidavit from the C/ID, DIOS certifying that although an investigation was conducted, the DIOS did not issue an investigation report because the allegations were unsubstantiated.

44. On 19 March 2014, the Applicant filed an application with the Tribunal challenging the C/ID, DIOS’ decision that the evidence obtained during the investigation did not substantiate her complaint of discrimination and abuse of power against the DUO/J (Case No. UNRWA/DT/JFO/2014/007).
45. On 17 April 2014, the Respondent submitted a reply to the application in Case No. UNRWA/DT/JFO/2014/007.

46. By Order No. 052 (UNRWA/DT/2014) dated 23 April 2014, the Tribunal ordered the Respondent *inter alia* to transmit to the Tribunal an unredacted version of the Closure Report and gave an opportunity to the Applicant to file comments on the Report and affidavit upon their transmission.

47. On 30 April 2014, the Respondent complied with the Tribunal's Order No. 052 (UNRWA/DT/2014) and produced an unredacted copy of the Closure Report.

48. On 4 May 2014, a redacted copy of the Closure Report and the C/DI's affidavit were transmitted to the Applicant.

49. On 18 May 2014, the Applicant filed her observations in relation to the Closure Report and the affidavit.

50. On 11 May 2014 in Case No. UNRWA/DT/JFO/2014/007, the Applicant filed a motion for leave to submit observations on the Respondent's reply. The motion was transmitted to the Respondent.

51. On 22 May 2014, the Respondent replied to the Applicant's motion for leave to submit observations in Case No. UNRWA/DT/JFO/2014/007. The Respondent requested the Tribunal to dismiss the Applicant's motion as she had not provided reasonable basis for filing observations on the reply.

52. On 6 June 2014, the Respondent requested leave to file a response to the Applicant's comments on the Closure Report in Case No. UNRWA/DT/JFO/2012/16.

53. In Order No. 069 (UNRWA/DT/2014) dated 26 June 2014, the Tribunal noted that in Case No. UNRWA/DT/JFO/2012/16 there was an outstanding motion filed by the Respondent entitled "Request for Leave to File a Response to the Applicant's comments on the Closure Report", and that in Case No. UNRWA/DT/JFO/2014/007 there was an outstanding motion filed by the Applicant entitled "Motion to Submit Observations on the Reply of the
Respondent". The Tribunal thus granted the parties in this Order an opportunity to make any final observations or comments in each of the three cases. The Respondent was also requested to inform the Tribunal of any action taken by the Agency in response to the recommendations made in the Closure Report.

54. On 15 July 2014 and 16 July 2014, the Applicant and the Respondent respectively filed their final observations or comments on the three cases.

55. By Order No. 085 (UNRWA/DT/2014) dated 28 August 2014, the Tribunal ordered the Respondent to produce ex parte an unredacted copy of the records of all the interviews conducted by the DIOS in relation to the Applicant’s complaint.

56. On 3 September 2014, the Respondent complied with the Tribunal’s Order No. 085 (UNRWA/DT/2014) and produced ex parte an unredacted copy of the records of the interviews conducted by the DIOS.

57. By Order No. 088 (UNRWA/DT/2014) dated 9 September 2014, the Tribunal convoked the parties to a hearing on 23 September 2014 and requested the Applicant to provide written testimonies of the witnesses proposed in her applications.

58. On 9 September 2014, the Applicant replied to Order No. 088 (UNRWA/DT/2014) requesting the Tribunal to amend the list of witnesses.

59. By Order No. 089 (UNRWA/DT/2014) dated 10 September 2014, the Tribunal granted the Applicant’s request to amend the list of witnesses.

60. On 16 September 2014, the Applicant complied with Order No. 089 (UNRWA/DT/2014) and provided the requested witnesses’ written statements.

61. Upon the Tribunal’s request, on 18 September 2014, the Applicant submitted again the witnesses’ written statements including a declaration in accordance with Article 12, paragraph 3 of the Tribunal’s Rules of Procedure.
62. On the same day, the Tribunal transmitted the witnesses' written statements produced by the Applicant to the Respondent.

63. By Order No. 095 (UNRWA/DT/2014) dated 18 September 2014, the Tribunal disclosed to the Applicant a redacted copy of the records of the interviews conducted by the DIOS in relation to her complaint.

64. On 23 September 2014, a hearing took place with the participation of the Applicant, her counsel and counsel for the Respondent.

65. By Order No. 100 (UNRWA/DT/2014) dated 29 September 2014, the Tribunal ordered the Applicant to provide further explanations and evidence concerning the material and moral damages allegedly suffered by her as mentioned in the hearing.

66. On 2 October 2014, the Applicant submitted her response to Order No. 100 (UNRWA/DT/2014).

67. On 8 October 2014, the Applicant's response to Order No. 100 (UNRWA/DT/2014) was transmitted to the Respondent. The Tribunal granted the Respondent until 13 October 2014 to file comments on the Applicant's response.

68. On 10 October 2014, the Respondent filed a motion for an extension of time to file comments on the Applicant's response.

69. By Order No. 105 (UNRWA/DT/2014) dated 12 October 2014, the Tribunal granted the Respondent until 14 October 2014 to provide comments on the Applicant's response to Order No. 100 (UNRWA/DT/2014).

70. On 15 October 2014, the Respondent filed his comments in response to Order No. 105 (UNRWA/DT/2014).

**Applicant's contentions**

71. The Applicant contends that:
i) she was not evaluated professionally and properly during her probationary period. After her former supervisor left Jordan Field Office ("JFO") at the end of December 2010, there were no further PERs and no negative remarks regarding her performance;

ii) on 31 March 2011, the last day of the probationary period, she was informed by phone of the decision to extend her probationary period without any notification in writing;

iii) she and another colleague were not confirmed as CAOs while two other colleagues, who were also on probation, were confirmed. The DUO/J's decision to extend her probationary period was biased and discriminatory because it was not applied equally to all four CAOs who were in the same circumstances;

iv) there was no evaluation meeting or working plan discussed with the Applicant before the DUO/J's decision to extend her probationary period. The DUO/J extended her probationary period with the aim to terminate her contract after expiry of the extensions, and to give the post to another person. She heard that her post was offered to another person during March 2011 before the expiry of her probationary period. The DUO/J placed the Applicant under an OTI plan before she had completed her first three months in service as DUO/J, and even before knowing the Applicant's performance. During the first three months of the OTI plan, the DUO/J did not provide the Applicant with any assistance, advice, support or feedback. OTI is not a mechanism to be used during probation but, as the DUO/J used this tool, the relevant procedures and guidelines should have been followed. An informal process must be initiated before the formal process, and in her case, that did not occur;

v) she should have been confirmed in the post of CAO based on her previous and actual performance. The Applicant has worked on improving the skills that the DUO/J believed were not adequate;
vi) she was not retained in service on her previous Area Officer post, at Grade 16, but the DUO/J offered her a different post on a project basis. This offer was not in line with the Agency’s Regulations and Rules;

vii) the contested decision is in contravention of Organization Directive No. 20 of June 2009, in particular with paragraph 5, in relation to the responsibilities of the Advisory Committee on Human Resources (“ACHR”). Her case was not submitted to the ACHR for review;

viii) she was a victim of abuse of power, and the DUO/J stressed several times that she could terminate her contract with no notice. The DUO/J’s conduct towards the Applicant constituted a violation of the Agency’s duties to ensure that all staff can work in an environment free from discrimination and abuse of power;

ix) the Agency contravened General Staff Circular No. 06/2010 (“GSC No. 06/2010”) because the DIOS refused to conduct an investigation and “did not opt for other options to address [her] complaint”;

x) the DIOS did not make any effort to ascertain whether the facts she presented in her complaint were accurate or not, or whether her allegations were well founded;

xi) her complaint was not related to performance issues as wrongly concluded by the DIOS, but to abuse of power and discrimination;

xii) the lack of investigation denied her the right to prove how she was subjected to abuse of power at a very critical time of her performance;

xiii) the Agency contravened GSC No. 06/2010, “when they neglected [her] complaint and decided not to investigate and then after more than a year they decided to investigate and then re-close the case”;

xiv) the Agency failed to conduct a credible, timely and fair investigation;
xv) the DIOS “den[ied] her the right to prove how she was subjected to harassment and abuse of power by Ex-DUO/J and neglected all the evidence and new facts and information submitted by [her] and nevertheless decided to re-close the investigation”.

72. The Applicant requests:

i) the Tribunal to hold an oral hearing and to invite several witnesses;

ii) rescission of the decision not to confirm her appointment as CAO and to separate her from service upon the expiry of her appointment on 16 September 2011;

iii) to be confirmed in her post retroactively, and to resume her duties as CAO at Grade 20;

iv) rescission of the DIOS “opinion” that her complaint against the DUO/J did not raise issues for the DIOS to examine. The Applicant requests that DIOS investigate her complaint of discrimination, and abuse of power;

v) rescission of the DIOS’ decision that the evidence obtained during the investigation did not substantiate the Applicant’s complaint of discrimination and abuse of power against the DUO/J;

vi) a copy of the investigation report and the witnesses’ statements;

vii) another investigation into her claim by an “independent and external investigator”;

viii) an investigation into the DIOS’ “unfair investigation practices”; and

ix) to receive compensation for all kinds of damages that she suffered as a result of the contested decisions, discrimination and abuse of power.
Respondent's contentions

73. The Respondent contends that:

i) the decision not to confirm the Applicant in the post of CAO, Zarqa was a proper decision. The letter dated 21 April 2010 appointing the Applicant to the CAO post provided that she would be required to serve a probationary period of twelve months. The decision not to confirm her appointment was based on her unsatisfactory performance during the extended probationary period. The probationary period had been extended because Ms. Mitchell, the recently appointed DUO/J, was not familiar with the Applicant's work and had noted deficiencies in the administration of Zarqa area;

ii) the Applicant's shortcomings were brought to her attention at several meetings. She also received guidance and feedback on her performance to improve. Yet, she failed to achieve the level of performance required for a CAO: a post with greater and different responsibilities than the Applicant's previous post of Area Officer;

iii) as the Applicant failed to satisfactorily complete her probationary period as CAO, the Agency was correct in not confirming her appointment;

iv) the Commissioner-General has a broad discretionary authority in the application of the Agency's Staff Regulations, Rules and Directives and the Applicant has the burden of proving prejudice or improper motivation. The Applicant failed to show that the contested decision was arbitrary or capricious or flawed by procedural irregularity or error of law;

v) the Applicant benefitted from the OTI process, to which she was otherwise not entitled during the probationary period. The OTI process gave the Applicant the opportunity to correct her "performance deficiencies";

vi) the Applicant had no right to be confirmed in the post of CAO as per paragraph 11 of Area Staff Personnel Directive A/4/Part VII/Rev. 7 ("PD
A/4/Part VII/Rev.7”) because satisfactory probationary service is a condition for the confirmation of an appointment;

vii) the Respondent concedes that the non-extension of the Applicant's fixed-term appointment was not submitted to the ACHR in accordance with Organization Directive No. 20. However, this irregularity is irrelevant. Given the "evidence of [her] failure to satisfactorily complete the probationary period, the ACHR would not have recommended against the decision not to confirm the Applicant as CAO, Zarqa, and would not have recommended the extension of her fixed-term appointment";

viii) the DUO/J did not subject the Applicant to abuse of power. The DIOS reviewed the Applicant's complaint and considered that it related to the assessment of her work performance;

ix) the decision not to investigate the Applicant's complaint was a proper decision. Once the DIOS had determined that the Applicant's complaint constituted a performance-related disagreement with her supervisor, the Applicant was not entitled to an investigation. Moreover, GSC 06/2010 does not ipso facto entitle the Applicant to an investigation, only to a preliminary assessment to determine if the matter should be closed or if a formal investigation is warranted;

x) although the DIOS’ initial assessment in September 2011 was that the subject matter of the Applicant’s complaint was better characterised as a performance-related disagreement with the DUO/J and thus, did not fall within the scope of GSC No. 06/2010, the DIOS subsequently reviewed its own decision and decided to conduct an investigation;

xi) once the DIOS determined that the Applicant's allegations related to prohibited conduct, thus warranting an investigation under GSC No. 06/2010, the DIOS conducted the investigation in a timely manner taking into consideration the limited investigation resources of the Agency, using an independent, external consultant to conduct the investigation;
xii) the DIOS properly followed the procedure set out in GSC No. 06/2010 for handling the Applicant's complaint;

xiii) the DIOS' investigation properly concluded that the evidence did not support the allegations against the DUO/J of discrimination and abuse of power in the decisions to extend the Applicant's probationary period and not to confirm her in the CAO post.

74. The Respondent requests:

i) leave to take part in the proceedings and submit a reply in cases UNRWA/DT/JFO/2012/09 and UNRWA/DT/JFO/2012/16;

ii) the Tribunal to reject each and all of the Applicant's pleas and to dismiss the three applications in their entirety.

Considerations

Preliminary issues

1. Request for leave to participate in the proceedings

75. The Tribunal notes that by Order No. 013 (UNRWA/DT/2012) dated 19 June 2012, the Tribunal granted leave to the Respondent to participate in the proceedings in cases UNRWA/DT/JFO/2012/09 and UNRWA/DT/JFO/2012/16 and to file late his replies to the applications.

2. Request for an oral hearing including witnesses

76. The Applicant requested the Tribunal to hold an oral hearing and to hear several witnesses. The Judge assigned to these cases decided by Order No. 088 (UNRWA/DT/2014) dated 9 September 2014 to hold a hearing on 23 September 2014 and requested the Applicant to submit written testimonies of the witnesses proposed in her applications. The Tribunal noted that, if after the hearing, the Judge considered it appropriate to hear the oral testimony of the witnesses, another hearing would be organised and the parties and witnesses would be
convoked. Upon the Applicant's request, by Order No. 089 (UNRWA/DT/2014) dated 10 September 2014, the initial list of witnesses proposed by the Applicant was amended.

77. The oral hearing took place on 23 September 2014, and the Tribunal considers that there is no need for a new hearing to be conducted as it has all the necessary information to issue its decision on the three cases. The Tribunal has heard the statements of both parties, and it has taken into consideration the written testimonies of the witnesses and the evidence in the case file.

**Merits**

1. **Case No. UNRWA/DT/JFO/2012/16**

78. In her application filed before this Tribunal on 13 March 2012, registered as Case No. UNRWA/DT/JFO/2012/16, the Applicant contested the decision dated 26 September 2011 by which the Acting Chief, Investigations Division, DIOS informed her that her complaint of discrimination and abuse of power against the DUO/J would not be subject to an investigation.

79. Although the Respondent argued in his reply to the above-mentioned application that an investigation was not conducted because the DIOS determined that the Applicant's allegations related to performance-related disagreements, in his reply to the application registered under Case No. UNRWA/DT/JFO/2014/007, the Respondent noted that the DIOS subsequently reviewed its own decision and decided to conduct an investigation. At the Tribunal's request, the Respondent submitted a Closure Report dated 16 July 2013 and an affidavit of the C/ID, DIOS relating to the Applicant's complaint. Later, the Respondent also submitted a copy of all the records of interviews conducted by the DIOS in relation to the Applicant's complaint. The Tribunal transmitted a redacted copy of these documents to the Applicant.

80. Therefore, the Tribunal notes that the contested decision dated 26 September 2011 not to conduct an investigation into the Applicant's complaint was revoked by another subsequent decision to conduct an investigation. While
the Tribunal regrets that the Respondent did not inform the Tribunal promptly about the existence of the investigation into the merits of the Applicant’s complaint, the Tribunal can only decide that this application is moot.

2. **Case No. UNRWA/DT/JFO/2012/09**

81. In her application filed before this Tribunal on 21 February 2012, the Applicant contested the decision not to confirm her appointment, after a probationary period, as CAO, Grade 20 at Zarqa Area Office, and to separate her from service upon the expiry of her appointment on 16 September 2011.

82. Effective 1 April 2010, the Applicant was promoted to the newly created post of CAO, at Zarqa Area Office, with a probationary period of one-year expiring on 31 March 2011. On 31 March 2011, the Applicant was informed that her probationary period would be extended for three months until 30 June 2011. On 28 April 2011, the Applicant was placed on an OTI working plan. The Applicant’s probationary period was further extended to 5 August 2011 then subsequently to 16 September 2011. By letter dated 5 September 2011, the DUO/J informed the Applicant that, following the probationary period, her appointment as CAO would not be confirmed. By letter dated 14 September 2011, the DUO/J advised the Applicant that her contract would expire on 16 September 2011. The Applicant was separated from the Agency upon the expiry of her appointment.

83. The reason for the decision not to confirm the Applicant’s appointment as CAO is specified in the DUO/J’s letter dated 5 September 2011 which states *inter alia* that “[d]uring this extended probationary period, [the Applicant] [has] not achieved an acceptable level of performance despite all supervisory services and support provided to [her].”

84. The applicable Regulations, Rules and other administrative issuances are the following:

Area Staff Regulation 4.2 provides that:
Appointments shall be subject to the satisfactory completion of not less than one month’s probationary service.

PD A/4/Part VII/Rev.7 provides in relevant part the following:

3. PURPOSE OF PROBATION

The purpose of probation is to fathom the overall performance and potential of a staff member in the job to which he/she is appointed, or reassigned with a view to determining the adequacy of his/her attitude in relation to certain normative standards of performance. Staff members are subject to probation on the occasions of:

(i) Appointment;
(ii) Reassignment or transfer with or without promotion.

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6. NOTIFICATION TO EMPLOYEE OF PROBATION ON TRANSFER AND PROMOTION

[…] If any extensions of such initial probation are decided upon, the employee will similarly be informed in writing, and given the grounds for the extension.

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9. EXTENSION OF INITIAL PROBATIONARY TERMS

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9.2. If an initial period of probation, whether for new appointments, transfers, or promotions, is extended, such extension and the grounds for it must be communicated to the employee in writing, prior to the expiry of the initial probationary term.

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11. In all circumstances satisfactory probationary service is a condition for confirmation of appointment, transfer and promotion.

Procedural alleged irregularities

- Grounds for the extension of the probationary period

85. First, the Tribunal has to consider if the DUO/J’s decision dated 5 September 2011 not to confirm the Applicant in the post of CAO was done
without any breach of procedure. The Applicant claims that there were procedural irregularities in the course of the first extension of her probationary period, in particular, she was not notified in writing of the grounds for the extension as required in PD A/4/Part VII/Rev.7. The Tribunal recalls that the only administrative decision contested in the present case is the decision dated 5 September 2011 by which the Applicant was not confirmed in the post of CAO. If the Applicant had the intention to contest in her application the legality of the decisions dated 31 March 2011 and 31 July 2011 by which her probationary period was extended, the Tribunal notes that she did not request the rescission of those two decisions.

86. Nevertheless, the Tribunal notes that the Applicant was not informed in writing about the grounds for the decision dated 31 March 2011 to extend her probationary period as required by PD A/4/Part VII/Rev.7, paragraphs 6 and 9.2 mentioned above.

* The OTI process

87. Second, the Applicant claims that her performance was improperly evaluated because the DUO/J, on 3 May 2011, incorrectly imposed on her an OTI working plan for the period from 31 March 2011 to 30 June 2011. She argues that the OTI is not a mechanism to be used on staff members during probation.

88. The Performance Management Policy for Area Staff dated 17 March 2010 specifies in Section III, the formal process, footnote 1, the following:

'The OTI process depends on effective management of two relevant but separate processes, i.e. the probation period (Ref. PD A4 part VII) and discipline and misconduct measures (Ref. PD A10 part III). Firstly, having an effective process for evaluating staff during the probation period ensures that the staff members who satisfactorily complete the probation period are assessed as being able to perform at consistently satisfactory levels. The OTI process is aimed at restoring declining performance to previously demonstrated levels of performance. It is not aimed at bringing a staff member's performance to a satisfactory level for the first time [...]
89. It is clear from the above that the DUO/J applied an incorrect process for evaluating the Applicant’s performance as there is a specific administrative issuance, namely PD A/4/Part VII/Rev.7, for the performance evaluation of staff members during their probationary period.

- Records of meetings

90. PD A/4/Part VII/Rev.7, paragraph 10, on review of probationary service – procedures and authorities, provides that:

10.2. Probationary service, whether it is in connection with a new appointment, a transfer or a promotion, shall normally be made a subject of assessment and record in the periodic report form applicable to the employee category concerned. Officials to whom authority is delegated to confirm probation or otherwise must ensure that the procedures relating to the recording and assessment of service by periodic report form have been properly complied with, and that their decisions are clearly annotated, signed and dated in the appropriate personnel records.

91. The Tribunal holds that the above-mentioned provision, which applies to the assessment of the Applicant’s probationary service, obliges the supervisor to record the meetings that he or she has with the staff member under probation, and that, as these periodic reports must be included in the personnel records, the staff member concerned must be provided with a copy of such reports. The Applicant claims that she did not receive a copy of the records of the meetings she had with the DUO/J.

92. Even assuming that the DUO/J considered that she was correct in applying the OTI process to assess the Applicant’s performance, the Performance Management Policy for Area Staff dated 17 March 2010, specifies in Section III.2, the OTI plan and work sheet, the following:

In any case, all follow up review and discussions taking place between the staff member and the supervisor(s)/Departments Heads during and at the end of the OTI period, should be carefully documented and signed by the parties involved in the discussion, so that it can be shown that supervisors have been clear, and staff members have had the opportunity to ask questions regarding the
plan, work assignments and the level of performance expected […]
(emphasis in the original)

93. In the present case, it is not contested by the Respondent that several notes
for the record were written and signed by the DUO/J following the meetings with
the Applicant, but that the Applicant never received a copy of them or even had
the opportunity to read or sign them.

- The ACHR

94. The Applicant claims that another irregularity occurred because the
decisions not to confirm her appointment and, consequently, to separate her from
service upon the expiry of her appointment on 16 September 2011, were not
submitted to the ACHR for recommendation to the Commissioner-General.

95. The Organization Directive No. 20, paragraph 5, in force at the time of the
facts, provides that the ACHR will make recommendations to the Commissioner-
General on:

   (d) Proposals regarding non-extension of fixed-term appointments
   for international staff and for area staff at Grade 18 and above;

96. The Respondent, who initially admitted in his reply that an irregularity
occurred, affirmed during the hearing that the recommendation of the ACHR was
not compulsory as the contested decision was a decision not to confirm an
appointment after a probationary period rather than a non-extension of a fixed-
term appointment. The Tribunal considers that the Respondent’s premise is
incorrect. The Applicant held a one-year fixed-term appointment during her
probationary period, and at the end of her initial probationary period, three types
of decisions could have occurred, i.e. (1) a confirmation of the Applicant’s
appointment as CAO; (2) an extension of her probationary period; or (3) the
expiry of her appointment, which in practical terms implies the non-renewal of the
Applicant’s one-year fixed-term appointment and, indeed, her separation from
service. The consultation of the ACHR is reserved for significant decisions
concerning inter alia senior area staff members. The decision not to confirm the
appointment of an area staff member at Grade 20 is indeed a very important decision as it involves the separation of a staff member whose appointment, at a high level, was decided by the Commissioner-General.

97. On 20 April 2010, the Applicant was informed of her selection for the post of CAO, Zarqa, effective 1 April 2010 with a promotion to Grade 20, subject to a probationary period of one year. The above-mentioned PD A/4/Part VII/Rev.7 specifies in paragraph 11 that "[i]n all circumstances satisfactory probationary service is a condition for confirmation of appointment, transfer and promotion". There is no doubt for the Tribunal that the promotion of the Applicant had to be confirmed by another decision at the end of her probationary period. Therefore, in reality, during her probationary period, the Applicant held a fixed-term appointment which could have been subject to an extension. Furthermore, this reasoning was shared by the Agency where, on 31 July 2011, the Applicant was informed that her fixed-term appointment, which had been due to expire on 16 August 2011, would be extended until 16 September 2011.

98. In light of the above, the Tribunal considers that the non-extension of the Applicant’s fixed-term appointment upon the expiry of her probationary period had to be submitted to the ACHR for its recommendation to the Commissioner-General. The DUO/J committed a procedural irregularity when she simply allowed the Applicant’s appointment to expire resulting in the Applicant’s separation from service without the consultation of the ACHR.

- Consequences of the above-mentioned irregularities

99. Not every procedural irregularity necessarily leads to the rescission of an administrative decision. Only the most serious irregularities lead to rescission. Therefore, the Tribunal must examine the significance of the above-mentioned irregularities and it will consider first the most serious one.

100. As already mentioned above, the decision not to confirm a staff member’s appointment after a probationary period is a significant decision as it implies his/her separation from service and the cancellation of an appointment which was
decided by the Commissioner-General. Contrary to what is alleged by the Respondent, it is not certain at all if the ACHR would have recommended the Commissioner-General not to renew the Applicant's appointment thereby not confirming her in the CAO post and separating her from service. This is mere speculation by the Respondent. Furthermore, the evidence in the file shows that Ms. Mitchell, the DUO/J, and the FHRO/J, wanted to avoid the case being examined by the ACHR. This is evident from the record of their interviews with the DIOS. The interview record of the FHRO/J refers to an email to the DUO/J dated 20 June 2011 in which she wrote "to avoid the ACHR we need to terminate both in the interests of the Agency. I was planning to do a non-extension for [the Applicant]...". When questioned by the DIOS about the content of this email, the FHRO/J mentioned that "Ms. Mitchell was concerned that HQ was going to undercut the Field on this matter for political reasons". The lack of consultation with the ACHR is a serious irregularity which certainly limited the Applicant's chances to be confirmed in the post. This procedural irregularity, along with others discussed above, justify the rescission of the contested decision.

- The Applicant's performance

101. At this point, the Tribunal must consider whether or not the Applicant's performance justified the decision not to confirm her appointment as CAO. Even if the Commissioner-General has a broad discretionary authority in evaluating the staff members' performance, the Tribunal must review if the reason for the contested decision is supported by the facts. The Tribunal recalls that, as held by the UNAT, there is a presumption of regularity of an administrative decision. In the present case, the Applicant has the burden of proving that the DUO/J committed a manifest error in the appraisal of her performance.

102. It is important to note that before 1 February 2011, the date of Ms. Mitchell's appointment as DUO/J, the Applicant had worked as CAO for 10 months under the supervision of the former DUO/J, Mr. Richard Cook. The Applicant submitted that her performance was satisfactory during this period and the Respondent has not contested such statement.
103. It is also important to specify what the Applicant’s responsibilities were in the post of CAO, which was a newly created post in 2010. The Professional Area Staff Post Description of CAO provides that:

The incumbent of this post is responsible to the Field Director. He/she liaises and coordinates with Field Department Heads on operational and administrative matters. The post is an essential management layer in the Field organization structure and brings a comprehensive perspective to Area level issues that cut across a wide range of programme and support service functions.

104. It is apparent from this Post Description that the CAO post was a post with significant responsibilities under the DUO/J’s direct supervision. Therefore, it is clear for the Tribunal that the incumbent of this post should enjoy the whole confidence of the DUO/J, and that it was reasonable for the DUO/J to particularly check the performance of a newly promoted CAO.

105. The evidence in the case file shows that 31 March 2011 was the first time that the DUO/J informed the Applicant by telephone of the extension of her probationary period. The only reason given by the DUO/J was that, as she had been appointed to the new post of DUO/J only two months earlier, she could not confirm the Applicant’s appointment and needed more time to assess her performance. The DIOJS’ report dated 16 July 2013 with respect to the Applicant’s complaint for discrimination and abuse of power, refers to a statement of the DUO/J in which she affirmed that “although the reason she had given [to the Applicant]... was true, she also already had some concerns, based on her observations in the field and feedback she was getting from various sources, regarding [her] performance as CAO”. The Tribunal considers that it is unfortunate that, at that time, the Applicant was not informed in writing about the full reasons of the extension of her probationary period, as required by PD A/4/Part VII/Rev.7.

106. The Tribunal notes that on 28 April 2011, the DUO/J and the FHRO met with the Applicant to discuss her performance, and on 3 May 2011, the Applicant received an OTI working plan. The Tribunal emphasises that the issue under review now is only to determine whether or not there were shortcomings in the
Applicant's performance as the legality of the OTI process has already been reviewed above. The OTI working plan contained a list of unachieved objectives, a detailed analysis of why the objectives were not met, and the remedial actions required to improve performance. On 23 June 2011, the mid-term review of the Applicant's OTI working plan took place. Another meeting was conducted on 30 June 2011 in relation to the mid-term review. On 5 September 2011, the final performance progress report was given to the Applicant.

107. In order to determine exactly what were the shortcomings in the Applicant's performance when the DUO/J made the contested decision, the Tribunal considers that the most relevant document in the case file, apart from the documents relating to the OTI process, is the Note for the Record, dated 4 September 2011, which was 12 days before the end of the Applicant's contract. Following a petition of the Chiefs of Programmes and Areas in Jordan, concerning the employment status of the Applicant and another CAO, the DUO/J scheduled a meeting with the Chiefs of Programmes and Areas concerned and a representative of the Area Staff Union. According to the Note for the Record of this meeting, the DUO/J explained to the participants the main problems with the performance of the two CAOs, giving specific examples. The DUO/J also noted that the two CAOs had refused any guidance with regard to management of staff, and that no major improvement had taken place since the OTI was initiated.

108. Even if this Note for the Record is contested by the Applicant as not relating exactly what was said during the meeting of 4 September 2011, the Tribunal finds that the overall evidence shows that the DUO/J had serious concerns about the Applicant's performance.

109. Nevertheless, the Applicant claimed in her written submissions, and during the oral hearing, that Ms. Mitchell, since the beginning of her appointment as DUO/J, already had decided not to confirm the Applicant's appointment and for this reason she filed a complaint for discrimination and abuse of power.
3. UNRWA/DT/JFO/2014/007

110. In order to complete its analysis of the cases, the Tribunal now turns to review the application in which the Applicant contests the decision of the C/ID, DIOS that the evidence obtained during the investigation did not substantiate her complaint of discrimination and abuse of power against the DUO/J. The Tribunal has stated above that the evidence in the case file shows that the DUO/J had serious concerns about the Applicant’s performance, however, the opinion of the Tribunal may change if the Applicant establishes that she was a victim of discrimination or abuse of power by Ms. Mitchell, the DUO/J.

111. GSC No. 06/2010 on Prohibition of Discrimination, Harassment - including Sexual Harassment - and Abuse of Power provides in paragraph 6 that:

(a) **Discrimination** is any unfair treatment or arbitrary distinction based on a person’s race, gender, religion, nationality, ethnic origin, disability, age, language, social origin, health, or other personal characteristics.

(b) **Harassment** is any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment.

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(d) **Abuse of power** is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his/her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of power may also include conduct that creates a hostile or offensive work environment which includes, but it is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of power.

112. Prior to reviewing the merits of Case No. UNRWA/DT/JFO/2014/007, the Tribunal must first identify the contested administrative decision. The Applicant
contested the decision taken by the C/ID, DIOS based on the findings of the report dated 16 July 2013, which concluded that the available evidence did not substantiate the Applicant's allegations of discrimination or abuse of power against Ms. Mitchell. The Tribunal considers that the Applicant was wrong when she contested such "decision". The DIOS does not decide whether or not discrimination, harassment or abuse of power actually occurred. The DIOS only recommends to the Commissioner-General that either the case be closed or further action be taken in relation to the findings of the investigation. Therefore, the DIOS' recommendation is not, in principle, an administrative decision that can be contested before the Tribunal.

113. However, in the present case, it is clear for the Tribunal that the Applicant's purpose was to contest the Commissioner-General's decision to close the case and not take any action in relation to her allegations against the DUO/J. After every DIOS' recommendation following a complaint of discrimination, harassment or abuse of power, the Commissioner-General, or the person who is granted delegation of authority on his behalf, must decide and notify the complainant and the subject of the investigation accordingly. In the absence of such a formal decision, the Tribunal considers that the Commissioner-General has implicitly decided to follow the DIOS' recommendation and close the case, and that the Applicant must be understood as contesting his decision.

114. The competence of the Tribunal is set out in Article 2 of its Statute, and the relevant provisions of Article 2 are as follows:

1. The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Commissioner-General as the Chief Executive Officer of UNRWA:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;
(b) To appeal an administrative decision imposing a disciplinary measure.

115. The UNAT has held in *Messinger*, 2011-UNAT-123 that:

It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment. This is different from a *de novo* investigation into a complaint of harassment.

116. Therefore, the Tribunal holds that it is entitled to review the Applicant’s claims of discrimination and abuse of power against Ms. Mitchell, the DUO/J, even if the DIOS concluded in its report that the evidence obtained did not substantiate the Applicant’s complaint. In these sorts of cases the Tribunal’s task is to review the alleged facts and determine if they are established. Subsequently, the Tribunal must consider if the established facts can be regarded as acts of discrimination or abuse of power.

117. The Applicant asserts that, contrary to the cases of two other CAOs who were appointed at the same time as her, her appointment and the appointment of another CAO were not confirmed at the end of the probationary period. The Applicant’s non-confirmation in the post cannot be considered as an act of discrimination. The four CAOs were independent of each other and each was evaluated separately. Therefore, whether or not any of them were confirmed in their posts depended on each CAO’s individual performance.

118. The Applicant has alleged in writing and during the hearing that since 1 April 2011, the new DUO/J, Ms. Mitchell, had already decided not to confirm her appointment as CAO. Following a question of the Judge as to why she believed that, the Applicant declared that the DUO/J was under the influence of a head of the Area Staff Union who did not like the Applicant. Even if this allegation was repeated by Mr. K., the former HR Career Management Officer, Jordan during his interview with DIOS, it is hearsay only and there is no convincing evidence of
any pressure on the DUO/J or that she potentially would have succumbed to any sort of pressure. Therefore, this contention is unsubstantiated.

119. The Applicant submits, and the Tribunal agrees, that the evidence in the case file supports her contention that, as of the date of the first extension of her probationary period, the DUO/J considered that her chances of being confirmed in her post were very low. Indeed, this is confirmed in the interview record of the DUO/J by the DIOS. It is clear for the Tribunal that as of the beginning of April 2011, the DUO/J considered that the Applicant's performance was not satisfactory, and she had many doubts about the Applicant's ability to improve. However, the Tribunal does not consider as evidence of abuse of power that a manager decides to extend a probationary period and renew such probationary period later on, even if he/she has doubts about the success of an improvement plan. On the contrary, these decisions may actually be considered as the last opportunity given to a staff member to improve his/her performance.

120. The Applicant complained that her supervisor wrongly placed her on an OTI as this process is not applicable to staff members on probation. The fact is established, and it is clear from the files, that the Applicant's placement on an OTI was a cause of dispute between the Applicant and the DUO/J. The Applicant submitted that the OTI was not the appropriate process to apply; however, the DUO/J, who knew that the OTI process was not appropriate for a staff member on probation, insisted on applying it. While the Tribunal considers that the Applicant was required to act upon the instructions of her supervisor and participate in the OTI process despite her own concerns, it is evident that the DUO/J's action to impose a process that is obviously not appropriate for the Applicant's case was a poor management decision which frustrated the Applicant.

121. The Tribunal has held above that it cannot rescind the decisions to extend the Applicant's probationary periods. However, it is not contested by the Respondent that the Applicant had not been informed in writing about the grounds for the decision dated 31 March 2011 to extend her probationary period as provided for in PD A/4/Part VII/Rev.7, quoted above in paragraph 84.
122. The Tribunal finds that the fact that the Applicant was not informed in writing about the basis for the decision to extend her probationary period is an irregularity which shows, at minimum, poor management. The Tribunal has decided above that the DUO/J committed a procedural irregularity when she allowed the Applicant’s appointment to expire without consulting the ACHR. The Tribunal has also taken note of the evidence in the case file, particularly in the DIOS’ report and interview records of Ms. Mitchell, the DUO/J, and the FHRO/J, in which their intention “to avoid the ACHR” was evident. The Tribunal refers in particular to an email dated 20 June 2011 from the FHRO/J to the DUO/J which has been mentioned in paragraph 100 above. The Tribunal considers that this irregularity was deliberately committed by the DUO/J and that such a breach of proceedings amounts indeed to abuse of power.

123. Furthermore, in the same chain of emails dated 20 June 2011, the DUO/J also noted “… I have just poisoned the well on both CAOs in a long memo regarding many things to the CG and DCG without naming names, just seeking their support for upcoming planned decisions…”. When the DIOS’ investigator questioned the DUO/J about the meaning of her statement, the DUO/J replied that “it’s just an expression”. When the investigator asked her “[d]oesn’t ‘poisoning the well’ imply far more than simply ‘informing’? Doesn’t it imply that you were twisting the facts to get the DCG and the CG on your side?”, the DUO/J answered “[t]hat is a fair assumption”. The Tribunal has no doubt that, in her statements, the DUO/J was referring to the Applicant’s appointment.

124. At this point in the review of the facts, the Tribunal considers that there is no need to go further, as there is convincing evidence in the case file that the DUO/J’s decision not to confirm the Applicant’s appointment as CAO was tainted by abuse of power. In these sorts of disputes it is often very difficult for the Tribunal to distinguish between poor management and abuse of power. However, in the present case, the DUO/J’s statements during the investigation conducted by the DIOS clarify the issue.
125. The Tribunal can only express its regret that, based on the evidence obtained during the investigation, in particular the records of the interviews, DIOS arrived at an opposite conclusion.

General conclusions on the three cases

126. Case No. UNRWA/DT/JFO/2012/09: It results from all that has been stated above that the decision not to confirm the Applicant's appointment as CAO and to separate her from service upon the expiry of her appointment is unlawful as it was tainted by several procedural irregularities and by abuse of power, and as such, it must be rescinded.

127. Case No. UNRWA/DT/JFO/2012/16: The initial DIOS' decision not to conduct an investigation into the Applicant's complaint of discrimination and abuse of power is moot, as the DIOS conducted an investigation later on.

128. Case No. UNRWA/DT/JFO/2014/007: The Commissioner-General's implied decision to follow the DIOS' recommendation and to close the case in relation to the Applicant's complaint of discrimination and abuse of power is rescinded.

Compensation

129. Pursuant to Article 10, paragraph 5(a) of the Statute of the Tribunal, when the Tribunal orders the rescission of a decision concerning appointment, promotion or termination, it shall also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision. If the Agency elects to reinstate the Applicant in the CAO post, this must be done retroactively.

130. While the Tribunal has decided to rescind 1) the decision not to confirm the Applicant's appointment as CAO; and 2) the Commissioner-General's implied decision to follow the DIOS' recommendation and close the case in relation to the Applicant's complaint, the consequences of these decisions were the same for the Applicant, namely her separation from service and, indeed, the loss of her
employment. Therefore, the compensation for these two decisions must be considered together.

131. In determining the amount the Agency will have to pay if it chooses not to reinstate the Applicant, the Tribunal has to consider the material damages suffered by the Applicant. In the present cases, while the Applicant claims that she has suffered material damages, she has never specified what sort of material damages she suffered. At the hearing, when the Tribunal asked the Applicant whether, after the termination of her appointment, she stayed unemployed or found a new job, no clear answer was given. After the hearing, by Order No. 100 (UNRWA/DT/2014) dated 29 September 2014, the Tribunal requested once more that the Applicant provide “further explanations and evidence concerning material and moral damage allegedly suffered by the Applicant”. In spite of being provided with a second opportunity to state her case for damages, in her response to the Order, the Applicant once again failed to specify if she remained without any income or earned any amount of money after her separation from service.

132. The UNAT held in Antaki 2010-UNAT-095 that “[c]ompensation may only be awarded if it has been established that the staff member suffered damages” and reaffirmed in Bertucci 2011-UNAT-114 “its disapproval for the awarding of compensation in the absence of actual prejudice”. As the Applicant has not justified her material damages, the Tribunal cannot grant her any compensation in this regard and decides that, if the Agency chooses not to reinstate the Applicant, no amount of money will be paid for material damages.

133. In relation to moral damages, the Applicant has given evidence that after her separation, she suffered from anguish and stress. The Tribunal finds that her physical and moral suffering are the result of her unlawful separation from service and, above all, are the consequences of being a victim of abuse of power. Therefore, the Tribunal decides to grant her compensation in the amount of USD16,000.
Conclusion

134. In view of the foregoing, the Tribunal hereby DECIDES:

i) the decision not to confirm the Applicant's appointment as CAO and, as a consequence, to separate her from service is rescinded;

ii) the initial decision not to investigate the Applicant's complaint for discrimination and abuse of power is moot;

iii) the Commissioner-General's implied decision not to take any action as a result of the investigation on the Applicant's complaint for discrimination and abuse of power is rescinded. However, there is no need for a new investigation to be conducted as the Tribunal holds that the Applicant was a victim of abuse of power;

iv) the Agency is ordered to pay the Applicant the amount of USD16,000 as moral damages;

v) The above sum is to be paid within 60 days of the date this Judgment becomes executable during which period the US Prime Rate, applicable as of that date, shall apply. If the sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of the payment; and

vi) All the other claims of the parties are rejected.

[Signature]

Judge Jean-François Cousin

Dated this 22nd day of October 2014
Entered in the Register on this 22nd day of October 2014

Laurie McNabb, Registrar, UNRWA DT, Amman